No. [redacted]50

In the Supreme Court of the United States

OCTOBER TERM, 1920

KERN RIVER COMPANY, PACIFIC LIGHT AND POWER CORPORATION, AND SOUTHERN CALIFORNIA EDISON COMPANY, APPELLANTS,

v.

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STATEMENT.

By an amended bill (R. 1–10), filed in the United States Court for the Southern District of California, the United States sought a decree against the Kern River Company, a corporation, setting aside, vacating and annulling a grant of a right of way affecting public lands in Kern County, California, now within the Sequoia National Forest, approved by the Secretary of the Interior to the said company upon its application therefor made under sections 18 to 21 of the Act of March 3, 1891, c. 561, 26 Stat. 1095,

1101, 1102, and the Act of May 11, 1898, c. 292, 30 Stat. 404. An injunction was also sought to restrain the defendant from using the right of way until it should have applied for and had it approved under the Act of February 15, 1901, c. 372, 31 Stat. 790.

By leave of the District Court the bill was subsequently amended to make the Pacific Light and Power Company and the Southern California Edison Company parties defendants, they having acquired an interest in the property involved, and the relief prayed against Kern River Company was prayed for against them, R. 66, 67.

The Act of March 3, 1891, *supra*, provided in sections 18 to 21 for a grant of a right of way through the public lands of the United States to any canal or ditch company *formed for the purpose of irrigation*, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals and fifty feet on each side of the marginal limits thereof. It was provided (section 18) that all maps of location of any company desiring the benefits of the Act should be subject to the approval of the Secretary of the Interior. It was required (section 19) that within a specified time after the location of ten miles of its canal, if upon surveyed lands, or if upon unsurveyed lands then within the same specified period after survey, the company should file a map of its ditch or canal, and that upon approval thereof by the Secretary all lands over which the right of way should pass should thereafter be disposed of subject to said right of way.

There was a proviso in section 20 that if any section of the proposed canal or ditch be not completed within five years after location, the rights granted should be forfeited as to that portion.

Section 21 is as follows:

> That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

The Act of May 11, 1898, *supra*, in section 2, amended the Act of March 3, 1891, by providing that the right of way granted under that Act (sections 18, 19, 20, 21)—

> may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

The Kern River Company, in June, 1898, filed with the proper local land officers an application for a right of way for a canal under these two Acts affecting certain lands specified in the bill. Par. VI, R. 4. With the map filed as a part of its application was a certificate of the president of the company setting forth that the right of way thus applied for was desired solely for the purposes prescribed by the said Acts. Thereafter, the Secretary of the Interior approved said application. Bill, pars. IV and V, R. 3.

Subsequently, in January, 1905, the company filed an application for approval of a right of way

for an amended location of its canal covering the lands included in its original application and other lands. This application was accompanied by a map, with which was a certificate by the president of the company that it was made so that the company might obtain the benefits of the two Acts referred to, and that the right of way was desired for *public purposes*. There was a further certificate that the canal, the right of way for which had been approved by the Secretary under the first application, had been actually constructed, except as the route thereof differed, as shown by the amended application, from the originally proposed route. Bill, par. IX, R. 5. This application was approved by the Secretary on November 27, 1905. Bill, par. XI, R. 6.

The theory of the Government's bill was that the Secretary's approval of the applications for these rights of way was secured through fraud, in that it was not the intention of the company to construct or use the canal for the purpose of irrigation and that it was never used for such purpose; on the contrary, the intention at all times was to use the canal for the sole purpose of carrying water to be used in generating power, and it has at all times since the construction of the canal been used for such purpose. Further, that the Secretary's approval of the maps and applications was given in reliance upon these representations and through error, mistake and inadvertence in the belief that the canal was to be used for the main purpose of irrigation,

and that there was attached to the grant thus secured an implied condition that the canal was to be so used.

It also appears that when the Secretary's attention was called to the fact that the canal was being used for power generating purposes, he caused notice to be served upon the Kern River Company requiring it to show cause why proceedings to cancel the grant should not be had. To this the company made answer, and thereafter the Secretary notified the company that it must amend its application so as to bring it within the provisions of the Act of February 15, 1901, *supra*. (This Act provided for issuance of permits for rights of way for power purposes.) The company declined to take action or to seek a permit under said Act.

To the Government's amended bill a motion to dismiss was interposed (R. 12, 13), the grounds of which were (1) that there was no authority for the bringing of the suit; (2) because the bill showed that the plaintiff was not entitled to relief; and (3) the statute of limitations in section 8 of the Act of March 3, 1891, *supra*.

This motion was denied (R. 13) and the defendant then made answer. R. 13–23. The facts above set forth were admitted, but the company asserted that no misrepresentations were made to the Secretary in connection with the procurement of the approval of the applications; that the company did intend to use the canal for irrigation purposes as well as

for power purposes, although it was admitted that it never did use it for the former. It was averred that the company secured under its applications a right of way for a canal for diverting and conveying water for the generation of electric power, and for irrigation, particularly under section 2 of the Act of May 11, 1898, *supra*, which granted same for "purposes of a public nature." There was a further defense made by a plea of laches on the part of the Government in bringing the suit.

The case was tried upon a stipulation of facts (R. 33–63), and oral testimony of one witness was adduced by the defendant company. R. 63–66. The main facts therein contained have been already detailed.

In the District Court there was a decree in favor of defendants, dismissing the bill. This decree is not in the record, nor are the findings made by that court.

Upon appeal, the Circuit Court of Appeals reversed the decree and remanded the cause to the District Court with instructions to enter a decree in favor of the United States, cancelling the orders approving the maps and location for the right of way, and enjoining the companies from further maintaining their canal upon the National Forest; the operation of the injunction to be suspended, however, to enable the companies to apply for such permit or right as is authorized by law. R. 76. Opinion, R. 69–75, 264 Fed. 412.

The appeal of the companies brings the case to this court.

PROPOSITIONS.

In support of the decree of the Circuit Court of Appeals we submit the following propositions:

1. The United States was entitled to bring this suit without specific statutory authorization.

2. The approval of the Secretary of the Interior of the applications for right of way was secured by fraud, concealment, and misrepresentation.

3. The Secretary's approval was beyond his authority, since the Acts under which the applications were made did not contemplate use of the right of way solely for power generating purposes.

ARGUMENT.

I.

The United States was entitled to bring this suit without specific statutory authorization.

It is asserted that inasmuch as this is a suit for the forfeiture of the right of way, there must be an express declaration of forfeiture by Congress to warrant the institution of the proceedings. We contend that in a case such as this, assuming the action to be one solely for forfeiture, no specific authorization is necessary. It is true that neither the Act of March 3, 1891, not the Act of May 11, 1898, contains a specific declaration that failure to use the right of way for the purposes contemplated by the Acts will subject it to forfeiture, but such a use is an implied condition of the grant, and a breach of an implied

condition constitutes as valid a basis for a suit as a breach of an express condition.

In *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, this court considered the right conferred by the Act of March 3, 1875, c. 152, 18 Stat. 482, which granted a right of way for railroads. This was a general Act in that it designated no specific grantee, and is in all practical aspects like the Acts here in question.

In the opinion, Mr. Justice Van Devanter thus characterized the nature of the grant (p. 47):

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

Considering, then, that the right of way granted to the Kern River Company was given *with an implied condition of reverter in the event the company ceases to use it for the purpose for which granted*, we can perceive no reason or necessity for an express declaration by Congress that the grant shall be considered forfeited, as a condition precedent to the filing of a suit to reinvest the grantor with title.

This court in *Schulenberg* v. *Harriman*, 21 Wall. 44, considered whether a specific grant in aid of railroad construction had become forfeited as to certain lands, and, in discussing the question as to how a breach of condition might be enforced, said (pp. 63, 64):

> In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office-found was necessary to determine the estate, but, as said by this court in a late case, "the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings."

In *Bybee* v. *Oregon & California R. R. Co.*, 139 U. S. 663, one of the questions presented was whether a grant to the Central Pacific Railroad had lapsed because of failure to construct the railroad. This court said (p. 674):

> And in all the cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is

> treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, *and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the lands.* (Italics ours.)

And at page 675:

> In *St. Louis &c Railway Co.* v. *McGee*, 115 U. S. 469, 473, it was said by Chief Justice Waite to have been often decided "that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law." "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity." The manner in which this forfeiture shall be declared is also stated in *United States* v. *Repentigny*, 5 Wall. 211, 267; *Farnsworth* v. *Minnesota & Pacific Railroad Co.*, 92 U. S. 49, 66; *McMicken* v. *United States*, 97 U. S. 204, 217.

It was said by this court in *Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 428:

> It cannot be supposed that Congress intended to vest a title in the railway company

> to this enormous grant of lands without contemplating that the Government might in some way reacquire it in case of a failure of the company to comply with the conditions of the grant. No express provision for a forfeiture was required to fix the rights of the Government. If an estate be granted upon a condition subsequent, no express words of forfeiture or reinvestiture of title are necessary to authorize the grantor to reenter in case of a breach of such conditions. *Stanley* v. *Colt*, 5 Wall. 119; *Mead* v. *Ballard*, 7 Wall. 290; *Ruch* v. *Rock Island*, 97 U. S. 693; *Hayden* v. *Stoughton*, 5 Pick. 528; *Jackson* v. *Allen*, 3 Cowen, 220; *Gray* v. *Blanchard*, 8 Pick. 283.

Now, if we correctly understand the position of appellants, it is that before a forfeiture can be enforced there must be both legislative declaration *and* judicial proceedings. We think the cases above cited clearly show either method sufficient and that both are not essential.

So far as we have been able to ascertain, the only case in this court which had in it this precise question is *Rio Grande Dam & Irr. Co.* v. *United States*, 215 U. S. 266, but the right to a forfeiture without specific authority therefor, while in the case, was not an issue. The point considered was as to the power of the trial court to permit amendment of the Government's bill after the case had been remanded by this court for further evidence upon the issues already made. Originally, the bill sought an injunction restraining the Rio Grande Company from constructing a dam across, and a reservoir on

or near, the Rio Grande River. In the supplemental bill, the right to file which was sustained, there was a prayer for a decree declaring a forfeiture of the rights acquired by the company under the Act of March 3, 1891, by reason of an approval of its application for a right of way for a dam. While the point was not passed upon, yet it is fair to presume that the decree *pro confesso*, declaring a forfeiture of the right of way, would not have been sustained in this court were it secured by a bill for the filing of which no authority was shown.

Other than the case at bar, there are but three cases reported in which this question has been considered by the federal courts.

In the case of *United States* v. *Whitney*, 176 Fed. 593, the United States brought a suit to secure a forfeiture of a reservoir site approved to defendant's testator under this same Act of March 3, 1891, as amended by the Act of May 11, 1898. The right of the Government to sue without specific authority from Congress was directly challenged. In a well considered opinion the Circuit Court for the district of Idaho sustained the right. It was there said, (pages 598, 599):

> The Act of March 3, 1891, is general and permanent in its character, and operates continuously to convey the title to public lands to all persons complying with its provisions. It can not be doubted that the forfeiture clause equally with the granting clause is also in the nature of general law and of a permanent character, and that, being true, it is not clear

> why it should not be held to be ample warrant to the Attorney General to enter the courts and there seek the enforcement of public rights and the restoration of the title to public property, thus "executing the law." By the Constitution it is made the duty of the chief executive to "take care that the laws be faithfully executed"; and, if certain rights are granted by general law, and by the same general law it is provided that such rights shall be forfeited on the breach of certain conditions, the breach existing, it is thought that the executive has the authority to institute proceedings in the courts to have such forfeiture judicially declared, and that suits brought for that purpose are judicial proceedings authorized by law.

The case of *United States* v. *Washington Imp. & D. Co.*, 189 Fed. 674, was a suit brought to secure a forfeiture of a right of way granted to the Washington Improvement & Development Company. It was held by the Circuit Court for the eastern district of Washington that specific congressional authority was essential to enable the Attorney General to bring the suit. That case, however, is different from the instant case for the reason that the grant was made by a special Act to a particular company.

It is true that in these two cases there was a failure to construct, and in the 1891 Act there is an express declaration (section 20) that upon failure to construct the right granted shall be forfeited, but we do not think that is a controlling distinction. If the forfeiture can be maintained for breach of an

express condition, it could equally be maintained for breach of an implied condition.

It is interesting to note that Judge Rudkin who rendered the opinion in *United States* v. *Washington Imp. & D. Co.*, *supra*, also wrote the opinion of the Court of Appeals in the instant case, upholding the right of the Government to sue.

A more recent case is that of *Union Land & Stock Co.* v. *United States*, 257 Fed. 635, in which the United States sued to have declared a forfeiture for non-construction of a right of way and easement for the storage of water, which had been approved to the Company upon its application under the Act of March 3, 1891. There was a decree for the United States and defendant appealed. It was contended that there was no authority for the prosecution of the suit, but the Court of Appeals held otherwise, approving the holding in *United States* v. *Whitney* and distinguishing *United States* v. *Washington Imp. & D. Co.* In the opinion it was said (page 638):

> It is not to be supposed, we think, that Congress intended that the United States should have no remedy for the failure of an applicant to complete his canal, ditch, or reservoir within the time limited, unless Congress intervened and by a special act either declared the right forfeited or gave express authority to institute a suit to recover the land.

Certainly it would be an absurd thing to hold that in all cases involving a right of way under this Act, many of which affect but a comparatively

trifling number of acres of public lands, the Government must receive from Congress specific authority before suit is brought to secure a forfeiture. In practical operation such a ruling would result in great delay, inconvenience, and waste of time.

Where a vast grant of lands in aid of construction of a railroad is concerned, it can be readily appreciated that the attention of Congress might very properly be directed to the consideration of whether a failure to comply with all the terms of the grant, should be taken advantage of. This is especially so when the road has been constructed, the prime purpose for which the grant was made. There might be such considerations presented as to incline Congress to waive the breach of conditions. But in the instant case no such situation is presented, nor is one likely in rights of way granted under this Act of 1891. In any event, we do not concede that specific authority is necessary even as to railroad land grants. In such cases as have been presented to Congress and authorization given for suit, that course was adopted doubtless out of abundance of caution so that no question of that sort could be raised.

The Circuit Court of Appeals in the instant case took the view that regardless of the question whether a forfeiture could be secured in the suit, without specific statutory authorization, the Government was entitled to a decree setting aside the Secretary's approval of the right of way and for an injunction

restraining further use by appellants except upon permit allowed under the Act of February 15, 1901.

This view was grounded upon, and we think amply supported by, what was said by this court in *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165. That case arose through a bill for an injunction against the Secretary of the Interior to restrain him from revoking his predecessor's approval of the company's application for a right of way under the Act of March 3, 1875, *supra*. In affirming a decree granting the injunction prayed for, this court said (p. 176):

> The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. *If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained.* *Moffat* v. *United States*, 112 U. S. 24; *United States* v. *Minor*, 114 U. S. 233. (Italics ours.)

Furthermore, if the approval of the right of way was secured fraudulently, in equity no rights as against the Government were acquired by the grantee; and that would be true upon the theory that the approval was unauthorized, since the right of way was not to be used for purposes contemplated by the statute. Hence, an injunction would be an appropriate remedy against unlawful occupancy of the land. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389.

II.

The approval of the Secretary of the Interior of the applications for right of way was secured by fraud, concealment, and misrepresentation.

A large part of the brief of appellants is devoted to a discussion of the facts relating to the securing of the approval of the right of way, and it is strenuously urged that no fraud in the procurement of the approval is shown by the record. We assert that the fraud is clear, gross and glaring, and the record shows it.

When the company first undertook to secure a right of way for a canal, it filed two maps with the Land Department as a part of its application for right of way for canal and pole lines and for necessary grounds for power plant for the purpose of generating and distributing electric power. It was stated that these maps were filed in order to obtain the benefits of sections 18 to 21 of the Act of March 3, 1891, *supra*, and the Act of May 14, 1896, c. 179, 29 Stat. 120. The Commissioner of the General Land Office, in passing upon said maps and application, wrote the register and receiver at Visalia, California, and refused to approve the maps in the form presented for reasons set forth in that letter. R. 26, 27. He said, with reference to the Acts of Congress involved (R. 26):

> The Department has held that "The two acts of March 3, 1891, and May 14, 1896, are so different in the character of estates or permission therein provided for, as well as in the

> uses to which the right of way may be devoted and the extent of such right of way, that no permission or grant can be sanctioned which is based on the two acts" (H. W. O'Melveny, 24 L. D. 560).

Thereupon, the company reformed its application and submitted it as an application for the canal under the Acts of March 3, 1891, and May 11, 1898, stating in a certificate of its president that the application was made to secure the benefit of those Acts and that "the right of way for such canal is desired solely for the purposes prescribed by the aforesaid acts," R. 46, 47. In the application, the company stated that the use to which the canal was to be devoted was: "Right of way for a canal for the purpose of irrigation and subsidiary purpose of the development of power," Answer, par. IV, R. 18.

Just previous to the approval of this application, the Secretary approved to the company a map for power house and transmission line under the Act of May 14, 1896.

The construction of the canal commenced in 1902 (Stipulation of facts, par. VI, R. 35), but no use was made of it until December 31, 1904, when the power plant went into operation, since which time it has been used for the development of electrical power for sale. Stipulation, par. IX, R. 36.

On December 23, 1904, as a result of certain suits brought against this company and others by Miller and Lux, the Kern River Company entered into an agreement with Miller and Lux which provided that

all water diverted by the company in this canal should be used solely for the purpose of generating power and for no other purpose. Stipulation, par. VII, R. 35.

The canal as constructed deviated from the location shown upon the map submitted with the first application, and thereafter the company, in January 1905, submitted application for an amended right of way under the 1891 and 1898 Acts. Stipulation, par. VIII, R. 36.

When this amended application came before the General Land Office, the Commissioner wrote the local land officers at Visalia as follows (Stipulation XVI, R. 37):

> The company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the act of March 3, 1891 (26 Stats. 1095) under which it is filed, but should be filed under the act of Feb. 15, 1901 (31 Stat. 790), which grants a permission to use the right of way over the public lands for irrigation and other purposes. See 32 L. D. 452, Denver, Northwestern & Pacific Ry. Co. vs. Hydro-Electric Power Co.

Upon receiving notification thereof, the company re-filed the application, and its president certified that the application was made to obtain the benefits of the two Acts of 1891 and 1898 and "I further certify that the right of way herein described is desired for public purposes," Ex. 7, R. 60, 61.

It is therefore clear that when the amended application was filed the Kern River Company had no thought, intention or purpose to use the canal for irrigation purposes but the sole purpose was to use it for power development. The company could not use it for irrigation purposes under the agreement with Miller and Lux, if it had ever intended to do so.

After the Commissioner of the General Land Office had informed the company that if it wanted this right of way for power purposes it should apply under the 1901 Act, did the company take issue with the Land Department and assert that it could properly come within the 1891 and 1898 Acts when it desired the right of way for power purposes? *Not at all.* It evaded the issue and renewed its application under those same acts—consequently, the Secretary understood that it was for irrigation principally, and not for power purposes solely, that the right of way was desired. Certainly that was the natural conclusion.

In their brief (p. 35) appellants say that fraud is never presumed and that "fair dealing is the normal presumption;" but the position of appellant companies is that that presumption is one which *courts* should indulge when called upon to relieve from fraud or misrepresentation, but that when an applicant seeks rights in public lands the *Secretary* can not indulge it. It may very pertinently be said that "fair dealing" would have suggested a frank and candid statement of the position of the company in making the application.

Again appellants, referring to the fact that the Secretary had specifically pointed out that if the right of way was not to be used for irrigation it could not be granted, say (Br., p. 30):

> Notwithstanding these circumstances, the company declined to so certify and certified as above stated that the right-of-way was desired for public purposes * * *.

We challenge them to point to any place in the record where it is shown that the company "declined to so certify." It did not decline at all. It evaded and dodged.

Notwithstanding these facts, appellants vigorously assert that there was no fraud and that fraud was not proved. They say (p. 35):

> One will look in vain for any misrepresentation, direct or indirect, on the part of appellant in obtaining the right of way.

Now that statement is of the same piece and just as disingenuous as the certificate which was made on the amended application. Of course, there was no direct statement that the right of way *was* desired for *irrigation purposes*, nor one that it was *not* desired for power purposes; and in a sense the generation of power is a *public use;* but what the company *refrained* from saying, and its conduct in the light of the objection to the application raised by the Secretary, condemn it absolutely.

To say the least, the company's conduct in the transaction was very "smooth."

To constitute actionable fraud and deceit, it is not necessary to show active misrepresentation; silence and evasiveness when a duty to speak and to be frank is imposed are just as reprehensible as the positive spoken untruth.

It is important to note the probable cause of the company's desire to secure a right of way under the 1891 and 1898 Acts, rather than to come under the 1901 Act. Under the first two mentioned Acts a grant of a right of way over public lands was secured which was permanent in its nature. The Act of February 15, 1901, authorized the issuance of a *permit* under rules and regulations to be established by the Secretary of the Interior, and there was a proviso:

> That any permission given by the Secretary of the Interior under the provisions of this act may be revoked * * * in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Thus, it is at once apparent that the right under the 1891 and 1898 Acts was the more desirable, since it vested a substantial interest in the land, did not subject the grantee to regulation, and gave permanency to the tenure. This undoubtedly furnished the motive for the company's conduct.

It is strenuously argued, however, that no deception was practiced on the Land Department because the Act of 1898 permitted the acquisition of right of way for canals "for purposes of a public nature"; that when the amended application was re-filed after the

suggestion had been made of the applicability of the 1901 Act if a power proposition was contemplated, the certificate was that the right of way was desired for "public purposes."

The history of the legislation which resulted in the Act of May, 18, 1898, *supra*, and an analysis of that and the other Acts granting rights of way and authorizing permits for rights of way, demonstrate that this assertion is without foundation.

The Act of March 3, 1891, as we have seen, granted a right of way for canals used for irrigation. By an Act of January 21, 1895, c. 37, 28 Stat. 635, Congress conferred authority upon the Secretary of the Interior to permit, under general regulations, the use of a right of way for tramroads, canals and reservoirs to any citizen or association of citizens engaged in *mining or quarrying or cutting timber and manufacturing lumber*. The Act of May 11, 1898, *supra*, which is so much relied upon by appellants, amended the Act of January 21, 1895, by enlarging the right conferred by the previous Act so as to confer a right of way where it was to be used for *furnishing water for domestic use*.

The Act further amended the Act of March 3, 1891, so as to allow the right of way therein provided for to be for purposes of a public nature, but after so providing, proceeded to set forth certain purposes for which the right of way might be used, and included in that was "for the development of power, as subsidiary to the main purpose of irrigation."

Here in the express terms of the Act we have a clear distinction between "public purposes" and "power purposes." If "public purposes" had contemplated "power development," it would have been unnecessary to have specified the latter. But Congress gave plain evidence that power development was not thus included when it limited the use to development of power *as subsidiary to the main purpose of irrigation*. In other words, the 1891 and 1898 Acts dealt with rights of way primarily for irrigation, domestic and beneficial use of water.

The history of the 1898 legislation bears out this analysis. It was first considered in the 54th Congress, 2nd session. As originally proposed, it provided that the Act of January 21, 1895, be amended by adding thereto the following:

> That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramways, canals, or reservoirs, and fifty feet on each side of the marginal limits thereof, by any citizen or association of citizens of the United States, or corporation for the purpose of furnishing water for domestic, public, and other beneficial uses; and all rights of way heretofore granted, or the applications for which have been made under the act approved March third, eighteen hundred and ninety-one, and entitled "An

> Act to repeal timber-culture laws, and for other purposes," may be used for said purposes.

In its report, No. 2790, the House Committee on Public Lands said:

> The purpose and effect of this bill is to allow the use of the right of way through the public lands for the purpose of furnishing water for domestic purposes. The right of way is now allowed by law for furnishing water for irrigation, mining, and reservoir purposes, and your committee can not conceive of any better or higher purpose for the use of the right of way than for furnishing the water for domestic and public use.

It was also recommended that a new section be added (section 2), which is the particular section in question in this case.

With the report is a communication from the Secretary of the Interior, who transmitted a report made to him by the Assistant Commissioner of the General Land Office. In the Secretary's letter recommendation was made that all parts of the bill relating to rights of way under the Act of March 3, 1891, be stricken from it. The reason given was:

> Sections 18 to 21, inclusive, of the act of March 3, 1891 (26 Stat. L., 1095), grant a right of way through the public lands for reservoirs and canals under the regulations of this Department, and maps filed for the approval of this Department are required to contain a certificate that the right of way is desired for irrigation purposes only.

I do not believe that it would be for the public benefit to have the rights of way granted under that act to be subject to the uses contemplated in the act in question, but that it would tend to confuse the right-of-way acts now in existence.

In his letter the Assistant Commissioner said:

The last clause permits the rights of way granted or those for which applications are pending under sections 18 to 21, act of March 3, 1891 (26 Stat. L., 1095), to be used for "furnishing water for domestic, public, and other beneficial uses." The effect would be to destroy all distinction between the acts of 1891 and 1895 above noted. The act of 1891 grants an easement, irrevocable so long as it is used for the purposes provided by the act, held by the Department to include irrigation purposes only, while the act of 1895 authorizes merely a license to use the public land, which is revocable, and which terminates with the disposal of the land by the United States, for the purposes of "mining or quarrying or cutting timber and manufacturing lumber." The easement for irrigation under the act of 1891 being of the nature of a public benefit, the license under the act of 1895 being of the nature of a private benefit. By allowing the easement granted under the act of 1891 to be used for "other beneficial uses," it would permit the right of way to be used for mining, quarrying, or lumbering, and would open the grant of the easement to all sorts of private uses, under the well-settled rulings of the courts of the Western

States in construing the words "beneficial use" in the local laws. This would be contrary to the spirit of the acts of 1891 and 1895 as understood by this office, in distinguishing between public and private uses, and appears, therefore, very objectionable.

I am of the opinion that if it were allowable to use the right of way for domestic or public purposes or for certain other purposes, which will not diminish the amount of water available for irrigation, as subsidiary to the main purpose of irrigation, the act of 1891 would be much more satisfactory in its operation and the intention of the act as conferring a general benefit would be fully subserved. I would therefore recommend that all after the word "uses" in line 16 be omitted, and the following added:

"SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature. And said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

The bill did not become a law, but the matter was again proposed in the 55th Congress, 2nd session, as H. R. 1595, and did become a law.

In the report on this bill (House Rep. 279), the Committee on Public Lands, after referring to the fact that the bill was identical with H. R. 9607 which had been drawn in accordance with the recommendations of the Secretary of the Interior and the Commissioner of the General Land Office, stated:

> The purposes and objects of this bill are to allow the use of rights of way over the public domain, not within the limits of any park, forest, military or Indian reservation, for the purposes of supplying water for domestic and public purposes. Such rights of way are now allowed by law for furnishing water for irrigation, mining, and reservoir purposes, and your committee can not conceive of any higher or better purposes for the use of such rights of way than for furnishing water for domestic and public uses. Such a law will accrue to the advantage of supplying a pure-water system to many cities and towns in many of the States and Territories, and aid in supplying the same for many other useful purposes.

When the bill was considered in the House, Mr. DeVries, in charge of it, in response to a question as to what change was made in the law by the proposed legislation, said (Cong. Rec., vol. 31, pt. 2, p. 1435):

> I will say, Mr. Speaker, that under the law as it stands at the present time all rights of way for the construction of reservoirs, canals, and ditches through the public do-

> main are limited to those the purposes of which are the furnishing of water for irrigation, mining, and reservoir purposes. It does not permit its use for private or domestic purposes, and if it is desired to supply a city from a reservoir or canal across the public domain such permission is not authorized by the law as it stands at present. It is therefore sought to amend the law by this bill, extending and enlarging the existing privileges and allowing a license over the public domain for these purposes. The bill was favorably reported in the Fifty-fourth Congress, and was passed by the House.

Again, Congress has enacted specific legislation for granting of rights where electrical or other power development was involved. These Acts granted different privileges than the "water" right of way Acts.

Thus the Act of May 14, 1896, c. 179, 29 Stat. 120, authorized the Secretary of the Interior, under general regulations, to *permit* the use of right of way upon the public lands and forest reservations, for the purposes of generating, manufacturing or distributing electric power.

This was followed by the Act of February 15, 1901, *supra*, which, as has already been said, authorized the Secretary of the Interior to *permit* under regulations, the use of rights of way over the public lands, forest and other reservations, etc. "for electrical plants, poles, and lines for the generation and distribution of electrical power" etc.

This legislation was existent when the Kern River Company filed its amended application in 1905, and all except the 1901 statute was in force when it filed its first application.

In all the legislation where rights were to be granted for power development, Congress has not authorized a *grant*, but a *permit*, the only modification being in the Act of 1898, where the right of way for canals was authorized to be used for power development *as subsidiary* to the main purpose of irrigation.

Not only does the history of the legislation sustain that view, but the Land Department has uniformly construed the right of way granted by the Act of March 3, 1891, to be one for irrigation only, and under the amendment by the Act of May 11, 1898, as for irrigation primarily and power development as subsidiary. Thus in the case of *Sinclair et al.*, 18 L. D. 573, it was said of the grant made by the Act of 1891 (pp. 573, 574):

> The grant made by this act restricts the use of the land over which the right of way is granted, to purposes of irrigation. The applications of Sinclair and Baldwin state that they desire the use of the water for the purpose of generating electricity to be used in the lighting of certain cities; this is outside of the scope and purpose of the act of March 3, 1891 (*supra*), and, consequently, no approval of any claimed right of way under said act could be granted.

To the same effect are *South Platte Canal & Res. Co.*, 20 L. D. 154, 156; *Chaffee County Ditch & Canal Co.*, 21 L. D. 63, 65; *William Marr*, 25 L. D. 344, 345.

In an opinion to the Secretary of the Interior, Mr. Assistant Attorney General Van Devanter, now Mr. Justice Van Devanter, considered the effect of the amendment of the Act of March 3, 1891, made by the Act of May 11, 1898, and said (28 L. D. 474, at p. 476):

> The act of May 11, 1898, *supra*, purports to be an amendment of the act of 1895, and section one relates only to the public lands not within the limits of any reservation. Section two is in effect amendatory of the act of 1891, and relates to all lands coming within the purview of that act, which embraced both public lands and reservations of the United States. It provides that the rights of way granted under the act of 1891 may be used for purposes of a public nature and for water transportation, domestic purposes and for the development of power. This section does not purport to make any new grant, but simply permits the rights of way granted by the act of 1891 to be used for other purposes than that of irrigation. No new class of grantees is described in this section, and to determine who may be entitled to a right of way it is necessary to turn to the act of 1891. There the grantees are described as "any canal or ditch company formed for the purpose of irrigation." If it had been intended to enlarge the class of grantees some apt language similar to that of the first section would have

> been used in this second section of the act of 1898. *The controlling idea was still, as in the act of 1891, irrigation.* (Italics ours.)

This opinion was followed in *Town of Delta*, 32 L. D. 461, 462; *Inyo Consolidated Water Co.*, 37 L. D. 78,79.

It is important to note that the opinion in 28 L. D., 474, was given June 6, 1899, just about one year after the Kern River Company's *first* application had been filed and less than two months after it had been approved. That opinion and the decision in *Town of Delta*, *supra*, were rendered before the *second* or amended application was filed in 1905. The Kern River Company, if it did not have actual notice, was chargeable at that time with notice of the ruling of the Land Department on the effect of the amendment contained in the Act of May 11, 1898.

This, we think, disposes of the contention that "public purposes" under the 1898 Act contemplated the purposes for which the Kern River Company desired the right of way, and that therefore there was no misrepresentation in the application and that the Secretary of the Interior was not deceived or misled by the statement in the certificate.

Appellants criticize (Br. 99, 100) the finding of the Circuit Court of Appeals that the representation in the certificate accompanying the second or amended application that the right of way was sought "for public purposes" was unqualifiedly false. But their brief then goes on to demonstrate fully that the right of way was desired for power purposes, although that is rather obscured by a reference to what the company

intended to do when it filed its *first* application and before it compromised with Miller and Lux, pp. 100, 101, 102.

They say the Court of Appeals assumed the whole point in the case, "namely, that the appellant acquired its right-of-way by fraud and for purposes other than the use to which it is being put, and that the use to which it is being put is not authorized by law."

Now, if our view of the use is correct, the Court of Appeals surely had proof of the fraud in the record. It did not base its decision, however, upon the assumption that the use being made of the right of way was other than what it was; on the contrary, that was one of the bases of the holding, for it found that the fraud consisted in representing that the right of way was desired for a use other than that to which it was intended to be put and to which it was and now is put.

The contention of appellants may be summed up thus:

Power development is a public purpose; we certified that we desired the right of way for "public purposes," *ergo*, there was no misrepresentation.

The vice of that contention lies in this, that power development was not such a public purpose as came within the intendment of the Acts of 1891 and 1898, and the Kern River Company knew it, for it had been so informed by the Land Department when it was told that if a power proposition was contemplated it should apply under the 1901 Act.

Counsel for appellants apparently realize the speciousness of the contention that the company was not guilty of fraud with respect to the transaction, and therefore seek to bolster their position by asserting that the Secretary could not have been misled because:

(1) The articles of incorporation of the company expressly provided, among other purposes, for that of supplying and storing water for the operation of machinery for the generation and transmission of electric and other power, and these articles of incorporation were filed with the Land Department. Appellants' brief, p. 20.

We suppose that the inference to which they hope to lead is that this put the Secretary on notice of the character of the Kern River Company's business and hence counteracted any evasion indulged in with regard to the application. But they fail to say that the articles also provided for construction and maintenance of canals, etc. for carrying water for irrigation. Bill, par. II, R. 2.

(2) In 1896, prior to the organization of the company, a prospectus was issued by a predecessor company showing it was the purpose of the Kern River Company to engage in the enterprise of irrigation and the generation of electrical energy. "The record does not disclose whether the Department of Interior was then aware of this prospectus. There was, however, no evidence introduced to show the contrary." Brief, pp. 23, 24.

The resort to these trifling details shows the want of real merit in answer to the charge of fraud and misrepresentation. They do not deserve serious consideration, and we refer to them only for the purpose of indicating the character of the defense.

III.

The Secretary's approval was beyond his authority, since the acts under which the applications were made did not contemplate use of the right of way solely for power-generating purposes.

For the purposes of the argument under this proposition, we may assume that fraud in the procurement of the allowance of the Secretary's approval of the applications has not been proved. However, we contend that even if all the facts were known to the Secretary it was beyond his power to approve the right of way, because it was not desired or intended to be used for the purposes contemplated by the Acts of 1891 and 1898.

It is conceded that the company has never used the canal for irrigation purposes and that it has been used solely for the purpose of carrying water to be used to generate electrical power. Stipulation, par. XXVI, R. 38. Moreover, there is no dispute that when the amended application was filed in 1905 the company had no *intention* of using the canal for irrigation, but, on the contrary, only for generating power.

Under these circumstances, even if these facts were known to the Secretary, he could not lawfully approve the right of way to the company. The Acts of 1891 and 1898 did not authorize the approval of a right of

way for the purpose for which the Kern River Company desired it. The Secretary of the Interior was authorized to approve rights of way only for the purposes specified. Hence, the approval of the right of way under these Acts was clearly void.

The Court of Appeals succinctly stated the proposition thus (R. 75; 264 Fed. 417):

> . . . if we should accept the appellees' view of the case, and find that the approval of the Secretary was given with full knowledge of all the facts, it would not avail them, because in that event the Secretary simply exceeded his authority, and the validity of his approval may well be challenged in a suit of this kind. Thus, in United States v. Poland, 251 U. S. 221, 40 Sup. Ct. 127, 64 L. Ed. —, decided January 5, 1920, the Supreme Court held that patents issued for more than 160 acres in a single body in the territory of Alaska under soldiers' additional homestead rights, were void, notwithstanding there was no fraud and the patents issued with full knowledge of all the facts.

A somewhat extended argument is made by appellants to support a defense that this suit is barred under section 8 of the Act of March 3, 1891, 26 Stat. 1095, 1099, and particular point is made of the fact that this section must be held to embrace suits affecting rights of way because it occurs in the same Act as do the sections providing for grants of right of way. The section referred to provides that suits to cancel *patents* thereafter issued shall be brought within six years after the date of the *patent*. It is

insisted that the word "patent" was intended and should be construed to embrace any act of an executive officer by which a title to or interest in public lands is vested.

We assert that being a statute of limitations against the Government, it must be strictly construed and not held to embrace more than clearly indicated by its terms, *United States* v. *Whited & Wheless*, 246 U. S. 552; further, that it can have no application to rights of way, for very obvious reasons. Thus: suppose a right were used seven years and then abandoned. Under appellants' theory no action could be maintained against the grantee. Or, suppose there had been no work of construction of the canal or ditch, which, under section 21, must be completed within five years. Of course, no suit to cancel for non-construction could be brought until after the expiration of the five years, and yet, according to appellants, it must be brought within six years. In other words, instead of having six years in which to bring suit the Government would have but one year, and, in the first supposed case, its right of action would be barred before it accrued.

CONCLUSION.

The decree of the Circuit Court of Appeals was right and should be affirmed.

Respectfully submitted.

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APRIL, 1921.